No. 82-1215

In the Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PAUL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the fee limitation provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. 1619 and 1621(a), constitute a "taking" of petitioners' right to collect additional fees and hence are unconstitutional unless just compensation is paid.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. a1-a12) is reported at 687 F.2d 364.

JURISDICTION

The judgment of the Court of Claims was entered on August 25, 1982 (Pet. App. a1). On November 16, 1982, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 20, 1983. The petition was filed on January 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]28 U.S.C. 1255 was repealed effective October 1, 1982, by Sections 123 and 402 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 36, 57. Although the judgment of the Court of Claims was rendered prior to that date, the petition was not filed until

STATEMENT

1. Petitioners are attorneys who signed contracts between 1965 and 1971 with several Alaska Native groups and entities to render professional services with regard to the Natives' aboriginal land claims. The contracts were largely identical and stated that compensation was "to be wholly contingent upon a recovery of money or property or both" in the amount "equitably due" the attorney as determined by "the court or tribunal awarding [the] recovery of property or money" (Pet. App. a24). The compensation clause, which encompassed the recovery of money or property by virtue of action by Congress, specified that the attorney's fee was not to exceed 10% of the recovery (*id.* at a25). Petitioners sought to have their contracts approved by the Secretary of the Interior pursuant to 25 U.S.C. 81.[2] Whether these contracts were in fact approved by the Secretary pursuant to 25 U.S.C. 81 is disputed in most instances; the Court of Claims assumed without deciding, however, that all the contracts were approved by the Secretary (Pet. App. a2).[3]

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after Section 1255 had been repealed. In addition, none of the provisions of Section 403 of the Federal Courts Improvement Act, which governs the transfer of pending cases from the Court of Claims, appears to address the availability of certiorari review of cases decided prior to October 1, 1982, but not filed in this Court until after that date. Nevertheless, we assume that for purposes of certiorari review this case may be deemed to have been automatically transferred to the new Federal Circuit on October 1, 1982, and that the jurisdiction of this Court may therefore properly be invoked under 28 U.S.C. 1254(1).

[2]25 U.S.C. 81 provides that "[n]o agreement shall be made by any person with any tribe or Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money * * * unless such contract or agreement * * * shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

[3]It is the government's position that none of petitioner Paul's contracts was approved pursuant to 25 U.S.C. 81. In particular, the United States contends that Paul's contract with the Arctic Slope Native Association (ASNA) did not require approval because 25 U.S.C. 81 applies

2. In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, under which the Alaska Natives received large amounts of money and property in settlement of their aboriginal land claims. The question of attorneys' fees was addressed by Congress both in Section 20 (43 U.S.C. 1619) and in Section 22(a) (43 U.S.C. 1621(a)) of the Act. Section 22(a) (reprinted at Pet. App. a23) voided all contracts that provided as a fee a percentage of the value of any portion of the legislative settlement. Section 20 (reprinted at Pet. App. a19-a23) set up an alternative procedure for payment of claims for fees and expenses for certain specified services, including services rendered in connection with the preparation of ANCSA and previous proposed settlement legislation. Congress restricted the total amount to be paid out under this section to attorneys to $1.9 million, further providing that payment would be on a pro rata basis if approved claims exceeded this aggregate limitation. 43 U.S.C. 1619(d)(4). The statute provided that claims would have to be submitted to the Chief Commissioner of the United States Court of Claims by December 18, 1972, or else they would be barred. 43 U.S.C. 1619(c). Review of claims determinations could be had before a review panel designated by the Chief Commissioner, but any other judicial review was prohibited. 43 U.S.C.

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only to contracts with tribal entities and ASNA is not recognized as a tribal entity. In light of this fact, the Secretary informed Paul on December 12, 1968, that the January 8, 1968 approval of the ASNA contract by the Acting Area Director of the Bureau of Indian Affairs, whose authority did not extend to determining whether ASNA was a tribal entity, was not required by 25 U.S.C. 81 and neither added to nor detracted from the contract. Upon the suggestion of the Secretary, petitioner Paul thereafter entered into seven contracts with the separate villages which made up ASNA. These contracts, however, were disapproved by the Secretary because they included a fee percentage arrangement rather than an hourly fee. The Secretary did approve in June 1968 contracts entered into with three Alaskan villages by petitioners Jackson and Fenton. Other contracts entered into by Jackson and Fenton either were disapproved or were never submitted for approval.

1619(d)(6) and (8). Finally, the statute declared it to be a misdemeanor to pay or receive any additional remuneration for services compensable under the Act, and it voided all contracts to the contrary. 43 U.S.C. 1619(f).

3. Petitioners filed claims with the Chief Commissioner and, in December 1974, signed a stipulation regarding the amount of compensation each would receive. Under the stipulation, signed by all claiming attorneys, payment was made on a pro rata basis, with the law firm of petitioner Paul receiving $697,000 (Paul receiving $276,000 personally) and petitioners Jackson and Fenton receiving $130,082 (Pet. App. a3).

Petitioners then sought to recover additional compensation by litigation. Petitioner Paul filed a breach of contract action in the United States District Court for the Western District of Washington in June 1976, seeking further compensation for services covered under ANCSA (and a declaration that Sections 20 and 22(a) of ANCSA were unconstitutional) as well as for services not covered by ANCSA (Pet. App. a4).[4] The district court, in an unreported decision, ruled that it had no jurisdiction because of Section 10(a) of ANCSA, 43 U.S.C. 1609(a), which provides that suits challenging the legality of the Act had to be commenced before December 18, 1972, by an authorized official of the State of Alaska in the United States District Court for the District of Alaska. In *Paul* v. *Andrus*, 639 F.2d 507 (1980), the Ninth Circuit affirmed on the basis that the time and venue restrictions of the statute were valid and barred the suit. Petitioners Jackson and Fenton filed a different suit in December 1977 in the United States District Court for the District of Alaska seeking similar relief. The district court denied relief

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[4]The action named as defendants several federal officials, 12 of the regional corporations organized under ANCSA, and the parties to petitioner Paul's employment contracts.

on a number of grounds (*Jackson* v. *United States*, 485 F. Supp. 1243 (D. Alaska 1980)), and the Ninth Circuit granted petitioners' motion to dismiss their appeal in light of *Paul* v. *Andrus, supra*. See Pet. App. a4.

4. The instant suits were reactivated in the Court of Claims following the resolution of *Paul* v. *Andrus*. Petitioners alleged for the first time in these actions that the limitation placed on attorney compensation by ANCSA, if valid, constituted a taking of vested contract rights that required just compensation. In particular, petitioners argued that (1) their employment contracts were approved by the Secretary pursuant to 25 U.S.C. 81; (2) the contractual rights became vested property rights after performance; and (3) because the contracts were approved pursuant to congressionally delegated authority, Congress could not thereafter abrogate or restrict the vested contractual rights without paying just compensation. Petitioners also contended that Sections 20 and 22(a) of ANCSA significantly impaired the First Amendment right of Alaska Natives to utilize legal counsel to petition the government for a redress of grievances. Because First Amendment rights were affected, petitioners contended, the attorney compensation sections could be justified only on the basis of a "clear and present danger."

The Court of Claims granted the government's motion for summary judgment and dismissed both petitions (Pet. App. a1-a12). The Court of Claims found three distinct defects in petitioners' position. First, the court held that *Paul* v. *Andrus, supra*, precluded petitioners from challenging the constitutionality of Sections 20 and 22(a) of ANCSA, both because that case was res judicata and because it correctly held that such a challenge could only be brought in accordance with the time and venue limitations of 43 U.S.C. 1609(a) (Pet. App. a4-a6). Second, the court held that, in any event, petitioners' challenge was without

merit because this Court repeatedly has upheld legislation "limiting an attorney's share of the funds he helped to procure from the Federal Government, despite a contract he may have, or have had, with the client for whom he obtained the federal money" (*id.* at a6). The Court of Claims found these decisions controlling here, and it rejected as an insufficient ground for distinguishing them the contention that this case has special First Amendment overtones because the petitioners were employed by the Alaska Natives in order to petition the government for a redress of their grievances (*id.* at a7-a8).[5] Likewise, the court held that the Secretary's approval of the attorney contracts, which it assumed arguendo to be a fact (see *id.* at a2), was not significant in that 25 U.S.C. 81 did not purport to prevent Congress from limiting legal fees associated with grants of federal monies (*id.* at a8-a9).

Finally, the court held that nothing in ANCSA or its legislative history supported a finding of a congressional purpose or authorization to take property by eminent domain. If petitioners' argument were correct that the fee limitations constituted a taking, the court explained, Congress' intent would likely have been that the provisions be declared unenforceable, and thus, in any event, the court held that there was no damage claim cognizable in the Court of Claims (Pet. App. a9-a12).

ARGUMENT

Petitioners contend (Pet. 7-21) that the Just Compensation Clause of the Fifth Amendment requires that the government pay them for legal services rendered to Alaska

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[5]The Court of Claims found the connection between the attorneys' fee provisions and the Alaska Natives' First Amendment rights to be "tenuous at best," noting that Sections 20 and 22(a) of ANCSA did not directly restrain any First Amendment rights of the Natives (or their attorneys). Moreover, the Act did not even constitute an indirect restraint, since the provisions were not enacted until after the rights were exercised. See Pet. App. a7-a8.

Native groups to the extent payment is not provided by ANCSA. This contention is wholly without merit and does not warrant review by this Court.

1. At the outset, we note that the Court of Claims correctly held that petitioners are precluded from challenging the constitutionality of ANCSA in this proceeding . See Pet. App. a4-a6. Section 10(a) of the Act, 43 U.S.C. 1609(a), requires that challenges to its legality be made in the District of Alaska within one year of the effective date of the Act. And the Ninth Circuit has already held in a case that is binding on petitioners here that their failure to comply with this provision bars their constitutional claims to additional attorneys' fees. *Paul* v. *Andrus*, 639 F.2d 507 (1980). Petitioners' claim that ANCSA's fee limitation violates the First Amendment (Pet. 7-11) therefore manifestly is barred. Moreover, petitioners' Fifth Amendment claim for additional compensation is also barred. Petitioners do not contend that Congress intended to pay them the compensation they seek here; such a claim would be patently frivolous in light of the explicit fee limitation of the Act. See Pet. App. a10. Rather, petitioners' argument is that ANCSA's fee limitation is an unconstitutional taking unless they receive the additional compensation they seek here. This is fundamentally a claim of unconstitutionality, and hence, contrary to petitioners' assertion (Pet. 19 n.10), it is also barred under Section 10(a) and *Paul* v. *Andrus, supra.*

2. a. In any event, the Court of Claims correctly rejected petitioners' claims on the merits. As the court explained (Pet. App. a6-a7), and, indeed, as petitioners concede (Pet. 14-19), there is a consistent line of decisions of this Court upholding limitations on an attorney's share of the funds he helped to procure from the government, notwithstanding the provisions of a private contract between the attorney and the client. See, *e.g., Hines* v. *Lowrey*, 305 U.S. 85, 91 (1938); *Calhoun* v. *Massie*, 253 U.S. 170, 173-177 (1920);

Capital Trust Co. v. *Calhoun*, 250 U.S. 208, 213-220 (1919). As the Court of Claims explained (Pet. App. a6):

> The core reasons for the validity and retroactive application of such provisions are that (a) the payment of federal funds cannot be made without legislation consenting to suit against the United States or authorizing the payment of federal money to the claimants, (b) Congress has the authority to mold and limit its consent to suit and its award of monies, and (c) in making attorney or client contracts the parties must be aware, particularly in view of much past practice (now well over a century old), that Congress could be "unwilling to enact any legislation without assuring itself that the benefits thereof would not inure largely to others than those named in the act." *Calhoun* v. *Massie*, *supra*, 253 U.S. at 176-77.

These principles are fully applicable here. The payments made under ANCSA were pursuant to Congress' powers under the Property Clause, Article IV, Section 3, and the Indian Commerce Clause, Article I, Section 8, and Congress plainly was authorized to make certain that these payments went only to the proper beneficiaries and, to that end, to limit the recovery of attorneys' fees from those payments. Indeed, Congress noted that the purpose of the fee limitation was "to protect the Native people." H.R. Conf. Rep. No. 92-746, 92d Cong., 1st Sess. 47 (1971). Any rights created by petitioners' contracts were subject ab initio to the power of Congress to invalidate contractual provisions that interfere with the legitimate exercise of its constitutional authority. See *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240, 309-310 (1935). Petitioners could not create by contract a vested property right to any portion of the revenues provided in ANCSA beyond those subsequently set aside by Congress for the payment of attorneys' fees. Accordingly, the fee limitation of the statute did not "take" any property rights.

b. Petitioners' attempted distinctions are unavailing. The first contention (Pet. 7-11) is that this case raises special First Amendment concerns because the legal representation here was to petition the government for a redress of the Alaska Natives' grievances; hence, according to petitioners, the fee limitation could be imposed only to meet a "clear and present danger."

As noted by the Court of Claims (Pet. App. a7), the connection between the fee limitation provisions of the Act and the First Amendment rights of the Alaska Natives is "tenuous at best," particularly in light of the fact that the activities supposedly affected occurred before the passage of the Act. Moreover, the notion that a fee limitation of $1.9 million will discourage legal representation in the future, which underlies petitioners' claim, assumes a minimum level of acceptable attorney compensation that is hardly self-evident. In any event, the fact that this case involves legal representation to petition Congress does not distinguish it from earlier congressional enactments. *Calhoun* v. *Massie*, *supra*, involved the fee claim of an attorney hired to prosecute a claim against the government for property taken during the Civil War. See 253 U.S. at 172-173. See also Pet. App. a8, citing the Indian Claims Commission Act, 25 U.S.C. 70n. The fee limitation here was enacted precisely to protect the rights of the Alaska Natives and to prevent them from being diminished by excessive attorneys' fee contracts.

c. Petitioners also contend (Pet. 12-19) that this case is different because the Secretary's approval of the contracts pursuant to 25 U.S.C. 81 transformed them into vested property rights protected by the Takings Clause. Assuming arguendo that these contracts were so approved (but see note 2, *supra*), that approval did not interpose a constitutional bar to Congress' enactment of the fee limitation.

Petitioners rely chiefly on this Court's decision in *Arizona Grocery Co.* v. *Atchison, T. S. F. Ry.*, 284 U.S. 370 (1932). Recognizing that *Arizona Grocery* rested entirely upon a statutory interpretation of the Interstate Commerce Act of 1887 and its progeny, petitioners argue (Pet. 12) that "it is time for the Court to denominate the rule enunciated in *Arizona Grocery* * * * as a constitutional principle." In *Arizona Grocery*, this Court simply held that, as a matter of statutory construction, once the ICC, after a hearing, had declared a particular rate to be reasonable, the Commission could not later order the payment of reparations to shippers for shipments made at that rate on the ground that a lower rate should have been charged. That decision is inapposite here.[6] It nowhere suggests that an executive official's approval of a contract acts to prevent Congress from imposing appropriate limitations on its disbursements of funds, even if those limitations diminish the rights of private parties under the contract.

By the same token, nothing in 25 U.S.C. 81 suggests that the parties to a contract approved thereunder are entitled to assume that Congress will not act in a manner that affects the rights under the contract (cf. Pet. 18), particularly when the congressional action is consistent with a long tradition of limiting fees. See Pet. App. a6. The fact that approval by the Secretary is a precondition to the enforceability of the contract does not mean that the approval itself validates a contract that is unenforceable for other reasons. As the

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[6]Similarly, the other cases cited by petitioners (Pet. 17-18) are inapposite. *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937), concerned property rights of Indians recognized by treaty or otherwise and rested in part on the quasi-sovereign status of Indian Tribes. Indeed, the fact of liability was not in issue in that case, only the measure of compensation. And, as petitioners themselves note (Pet. 18), *Perry* v. *United States*, 294 U.S. 330 (1935), expressly stated that it concerned only government contracts, not contracts between private parties.

Court of Claims stated (Pet. App. a9), approval under 25 U.S.C. 81 was intended to be "a first screen for possible abuses, not a grant of complete and vested rights to the attorney."

3. Finally, the Court of Claims correctly held (Pet. App. a9-a12) that, even if the fee limitation is considered a "taking," petitioners would not be entitled to compensation from the government. ANCSA plainly evinces an intent to limit the legal fees payable out of government funds as a result of this settlement, and there is no reason to suppose that Congress would have wanted to pay additional compensation to the attorneys beyond that specified in the Act. Rather, if the fee limitation were held to be a taking without just compensation, the proper remedy would be simply to strike it down. See *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

DOJ-1983-04